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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES ANTHONY LOAIZA,

Defendant and Appellant.

B172335

(Los Angeles County
Super. Ct. No. KA061553)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Charles Horan, Judge. Affirmed.

Hence & Associates and Bill Hence, Jr., for Defendant and Appellant.

Bill Lockyer, Attorney General of the State of California, Robert R. Anderson,
Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney
General, Deborah J. Chuang and Erika D. Jackson, Deputy Attorneys General, for
Plaintiff and Respondent.

Appellant James Anthony Loaiza was convicted, following a jury trial, of one count of first degree murder in violation of Penal Code section 187, subdivision (a). The jury found true the allegations that appellant committed the murder for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1) and personally and intentionally discharged a firearm causing death within the meaning of section 12022.53, subdivision (d). The trial court sentenced appellant to a total of 60 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that there is insufficient evidence to support the jury's verdict, the trial court erred in refusing to bifurcate the trial of the murder charge from the trial of the gang enhancement, and in admitting the dog scent evidence and evidence of appellant's jailhouse conversation with his girlfriend. Appellant also contends that the trial court denied him his right to cross-examine a witness. We affirm the judgment of conviction.

Facts

In the evening of July 14, 2001, Nicholas Lopez had a party at his home on Wickford Avenue in La Puente. At about 3:00 a.m., four to seven Hispanic men approached the front of the house. Lopez directed the female party guests to stay back. He and some other party guests walked toward the Hispanic men.

One of the men asked Lopez where he was from. One of the men said that this was his neighborhood. Lopez replied: "This is my house." Or "This is my grandmother's house." He also said: "Brown Authority," the name of a party crew or gang.

Someone in the group of Hispanic men yelled "Eastside Puente." A man from the group pulled out a chrome gun and shot Lopez in the chest. All the Hispanic men ran away.

Lopez ran toward his patio and collapsed. He later died from the gunshot wound.

Police and paramedics arrived a short time later. Several party-goers told police about the shooting.

Johnny Salas told police that the shooter was 5'6" or 5'7" between 19 and 22 years old with a shaved head and a light mustache.

Police used a scent transfer unit to create a scent pad from a shell casing found on the sidewalk. Using these pads, police dogs tracked a scent from the crime scene. One dog alerted in the yard of Jose Abundis.

Earlier that morning, at about 3:00 a.m., Abundis had heard a loud noise which sounded like people jumping a fence and running in his backyard. He looked out and saw appellant, his brother Raymond Loaiza, Larry Lopez, Carlos Anchondo and David Garcia hiding behind some bushes in his backyard. The men, all Eastside Puente gang members, were whispering and appeared out of breath. Abundis told the men to be quiet. Abundis's mother told the men to leave. They did.

When the police dog followed the scent away from Abundis's house, it alerted at the backyard fence of appellant's residence. A second police dog then tracked the scent into the house and alerted to the underside of a cushion on the couch. However, nothing was there at the time.

On July 15, Abundis heard Gabriel Martinez, an Eastside Puente gang member, say that appellant had shot "that guy." On July 17, Abundis heard Larry Lopez and Carlos Anchondo say that appellant had committed the shooting.

About a week after the shooting, Abundis saw appellant and others at the home of Judy Woodmancy. Abundis overheard appellant tell Woodmancy that "he got that fool" and was "laying low" for a few weeks. Abundis observed that appellant had what appeared to be a .25 caliber silver semi-automatic gun.

On July 31, Larry Lopez admitted to Deputy Sheriff Richard Lopez that he and three to eight other gang members went to Nicholas Lopez's home to find out what was going on. Lopez stated that one of his fellow gang members got into an argument with someone on the lawn. Lopez and his fellow gang members all yelled "Eastside Puente." Lopez heard a shot. All the gang members ran away to the north.

In early August 2003, Michael Frondarina, a former Eastside Puente gang member, heard appellant say that he and some "homies smoked" somebody, meaning that someone was shot. Appellant said he had used a .32 caliber gun.

Just prior to the preliminary hearing in this matter, a member of the Eastside Puente gang chased Abundis while waving a gun, called him a snitch and a rat and said that he was going to kill him.

Appellant's aunt, Rachel Aguilar, testified that appellant's brother Raymond got drunk at a barbeque the night of July 14, 2001 and spent the night at her house on appellant's bed. Appellant did not spend the night there.

Deputy Sheriff Ronald Duval testified as a gang expert that a murder committed in the manner of Nicholas Lopez's murder would have been committed to benefit the criminal street gang Eastside Puente. He explained that the killing was a show of force intended to reinforce the notion that the neighborhood belonged to that gang. When appellant and his fellow gang members were not allowed into the party, it was a sign of disrespect to them and they responded by killing Nicholas.

In his defense, appellant presented several witnesses who testified that he was at a barbeque at his house until 11:00 or 11:30 p.m. on July 14 and that he left with his girlfriend. Appellant's girlfriend's mother, Celia Santillan, testified that appellant and her daughter came to her house between 11:30 p.m. and midnight on July 14 and that appellant spent the night on the couch. Santillan saw him on the couch at various times during the night when she got up to use the bathroom.

Appellant also presented testimony by Woodmancy that appellant did not tell her that he shot anyone and did not have a gun at her house.

Discussion

1. Sufficiency of the evidence

Appellant contends that no reasonable trier of fact could believe the testimony of Abundis or Frondarina and that without their testimony, the evidence was insufficient to support the jury's verdict. We see sufficient evidence to support the verdict.

"Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." (*People v. Jones* (1990) 51 Cal.3d 294, 314.)

The standard of review is the same when the prosecution relies mainly on circumstantial evidence. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.'" (*People v. Bean* (1988) 46 Cal.3d 919, 932-933.)

We do not agree with appellant that no reasonable trier of fact could find the testimony of Abundis or Frondarina credible. Certainly, the witnesses gave somewhat different versions of the events on different occasions. They may well have had motives to lie. Neither witness was so incredible that no rational juror could believe them.

The evidence as a whole is sufficient to support the jury's verdict. There was no real dispute that Nicholas was killed by men who identified themselves with the Eastside Puente gang. Appellant was a member of that gang and was seen with other gang members very near the scene of the shooting at the time of the shooting. The men were out-of-breath and hiding. A scent trail led from the scene of the shooting to appellant's

house. About a week after the shooting, appellant stated that "he got that fool" and was "laying low." A month after the shooting, a gang member told police that he and some other gang members had "smoked" someone and that appellant had used a .32 caliber gun during the shooting.

2. Failure to bifurcate

Appellant contends that trial court erred in refusing his request to bifurcate the trial of the gang allegation from the trial on guilt. He contends that no gang evidence should have been admitted at trial. In the alternative, he contends that three specific pieces of gang evidence should not have been admitted at trial. We see no abuse of discretion.

It is well established that gang evidence is admissible when the very reason for the crime is gang related. (*People v. Champion* (1995) 9 Cal.4th 879, 922; *People v. Tuilaepa* (1992) 4 Cal.4th 569, 588; *People v. Frausto* (1982) 135 Cal.App.3d 129, 140; *People v. Beyea* (1974) 38 Cal.App.3d 176, 194.) In addition to motive, relevant gang evidence is admissible to show intent or identity. (*People v. Price* (1991) 1 Cal.4th 324, 397.)

That was the case here. Appellant's gang membership was relevant to show motive, intent and identity, as well as to prove the gang allegation.

Appellant contends that even if the evidence was relevant, the probative value of the gang evidence outweighed any prejudicial value, and so the evidence should have been excluded from the guilt phase under Evidence Code section 352. We do not agree.

As our Supreme Court has explained, when evidence supporting a gang enhancement is admissible at a trial of guilt, any inference of prejudice is dispelled, and bifurcation is not necessary. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

Appellant also contends that even if gang evidence generally was admissible during the guilt phase, the trial court made three specific errors involving gang evidence.

Appellant first contends that the trial court erred in permitting the prosecution to display boards containing statements such as "This is Eastside Puente, this is my

neighborhood" and photographs of Eastside Puente gang members, including appellant. The board also contained a depiction of a gun. He contends that the statements and images were admitted without foundation and relevance.

We see no error in the use of the boards. Witnesses did testify that someone in the group of men who came to Nicholas's house uttered those or similar words. Circumstantial evidence placed appellant and other Eastside Puente gang members at Nicholas's house. This the statements did have a foundation and relevance.

Appellant did not object that the photographs lacked foundation or relevance and so has waived this claim. (*People v. Pinholster* (1992) 1 Cal.4th 865, 935.) Appellant did object that the photographs of the men and the depiction of the gun were prejudicial. On appeal, he repeats his claim that the photos were mug shots and booking photos. The trial court found that the photos were not mug shots and were not prejudicial. On the record before us, we have no reason to question the trial court's characterization of the photos, or its finding that the photos were not prejudicial. We see nothing inflammatory about the image of the gun. The positioning of the gun between the victim's photo and appellant's photo with the gun pointing at the victim's head was a form of argument. It should not have been displayed for the whole trial. However, we see no prejudice to appellant from this display. It was the theme of the prosecution's case, and was before the jury verbally every day.

Appellant also contends that the trial court erred in allowing Deputy Duval to testify by way of a hypothetical question that a murder committed in the manner in which Nicholas was killed would have been committed for the benefit of a criminal street gang. He contends that this testimony was cumulative, duplicative, unduly prejudicial and rendered moot by the defense stipulation that Eastside Puente was a criminal street gang. We see no error.

Appellant did not stipulate that Nicholas's murder was for the benefit of a criminal street gang. Experts, including gang experts, may give an opinion of the basis of facts given in a hypothetical that asks the expert to assume their truth. (*People v. Gardeley*

(1996) 14 Cal.4th 605, 618.) The facts must be rooted in the evidence. (*Ibid.*) That was the case here.

Appellant further contends that the trial court erred in requiring him to lift his shirt and show his tattoo of the word "Puente" across his stomach. This took place during the testimony of his aunt, Rachel Aguilar. Assuming for the sake of argument that the trial court erred, we see no prejudice to appellant. As appellant acknowledges, his gang membership was already known. His counsel offered to stipulate that he had a tattoo. There is nothing in the record to suggest that the tattoo had a gory image or some other design feature that made it inflammatory.

3. Dog scent evidence

Appellant contends that the dog scent evidence should not have been admitted because the dogs were given scent pads created by a scent transfer unit and that there was no proper foundation as to the scent transfer unit's scientific reliability. Respondent contends that appellant has waived this claim by failing to object in the trial court. We agree that the claim is waived.

The California Supreme Court long ago adopted the test for admissibility of newly developed scientific techniques set forth in *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013. (*People v. Kelly* (1976) 17 Cal.3d 24, 30-32.) This test requires the proponent of such evidence to show to general acceptance of the technique in the relevant scientific community, testimony from a properly qualified expert about the technique and its application and proof that the generally accepted procedures were correctly followed in the particular case. (*Ibid.*)

A party's failure to object to scientific evidence on *Kelly-Frye* grounds in the trial court waives an appellate claim that the evidence was improperly admitted without an adequate *Kelly-Frye* foundation. (*People v. Ochoa* (1998) 19 Cal.4th 353, 414; *People v. Kaurish* (1990) 52 Cal.3d 648, 688.)

To the extent that appellant contends that his failure to object was excused by developments in the law which occurred during or just after his trial, appellant is

mistaken. The opinion upon which appellant relies, *People v. Mitchell* (2003) 110 Cal.App.4th 772, was issued on July 18, 2003. The preliminary hearing in this matter took place on July 30, 2003. Trial began in November, 2003.

Further, even if we assume error, appellant has not shown prejudice from the assumed error. The Court in *Mitchell* held only that the scent transfer unit should have been subjected to a *Kelly-Frye* hearing. We have no way of knowing what the outcome of such a hearing in this case would have been. It is not a foregone conclusion that scent transfer units would be found to be scientifically unreliable, or even unreliable in certain instances.

4. Jailhouse conversation

Appellant contends that the trial court erred in admitting tape-recorded evidence of a jailhouse conversation which he had with his girlfriend because it violated his state and federal privacy rights. He also contends that the prosecutor improperly speculated about the meaning of the conversation during closing argument. Respondent contends that appellant has waived both claims by failing to object in the trial court.

We agree that the claim of erroneous admission is waived. (*United States v. Olano* (1993) 507 U.S. 725, 737; *People v. Williams* (1997) 16 Cal.4th 153, 250; *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1192-1193.)

Appellant did object that the prosecutor was speculating and his argument was based on facts not in evidence. This claim is not waived.

"[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine.' [Citations.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 526.)

Here, the prosecutor argued that appellant's tone of voice, his girlfriend's reluctance to testify, and certain "odd" statements such as the girlfriend's statement that she could have been killed showed that the two were concocting an alibi. While we do

not find this argument persuasive, we do not find it unreasonable or improper either. The mere fact that appellant and his girlfriend did not directly state that they were fabricating an alibi does not render the prosecutor's argument unreasonable.

5. Cross-examination

Appellant contends that he was denied the right to cross-examine Abundis on the lighting conditions in his backyard on the night of the incident. We do not agree.

Appellant's counsel asked Abundis several questions about the lighting in his backyard, moved on to other subjects, then asked: "What were the lighting conditions like that night?" The trial court pointed out that Abundis had stated that there was a flood light in the front yard that cast light in the backyard, and sustained its own objection to appellant's counsel's question. The court did not permit appellant's counsel to approach the bench to argue the ruling, and instructed him to ask another question.

Appellant contends that he had not had an opportunity to gather detailed information about the lighting in the yard, how well the witness could see and exactly what the witness saw. We see nothing in the trial court's ruling which precluded appellant's counsel from asking Abundis exactly what he saw, or in asking other specific questions such as whether the men's faces were in shadows. Abundis's earlier answers to lighting questions showed that he did not remember specifics of the lighting, such as whether the motion detector light was working in the backyard or not. Thus, appellant was not deprived of his right to cross-examine Abundis.

Disposition

The judgment is affirmed.

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ARMSTRONG, Acting P.J.

We concur:

MOSK, J.

KRIEGLER, J.^{*}

^{*} Judge of the Superior Court of Los Angeles County, assigned by Chief Justice pursuant to article VI, section 6, of the California Constitution.